# Department of Law Monthly Report

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## In This Issue



## Commercial Section

### ABC BOARD FORFEITURE CASE RESOLVED

Earlier this year the state filed an *in rem* civil forfeiture action for various quantities and types of alcoholic beverages based on improper warehousing by the airport restaurant in Unalaska. Following negotiations in which AAG Linda Kesterson represented the ABC Board, the parties agreed to settle the case. The restaurant forfeited all of the beer (in excess of 600 cases), which will be destroyed. The remainder of the alcohol was returned to the restaurant.

## Environmental

### EKLUTNA, INC., SETTLES POLLUTION CLAIM

Eklutna, Inc., acquired the Anchorage lot where the downtown Office Depot now stands in a 1987 land exchange with the state. In 1999, the company discovered old fuel oil contamination on the property, and it later sued

the state and prior owners for compensation. On September 30, 2002, Eklutna accepted a joint offer of judgment lodged by the state and three elderly individuals who had previously held interests in the property. The $125,000 offer covers Eklutna's direct cost of cleaning the contamination, but excludes its larger claim for alleged diminution in value of the parcel. The state's net share of this joint reimbursement to Eklutna is $92,600. AAG Chris Kennedy defended the case.

### STATE SUES INTERIOR FOR SPILL RESPONSE COSTS

The Department of Environmental Conservation has filed suit in federal court in Anchorage to recover its expenses in responding to spills or contamination at six Department of Interior sites. For several years, Interior has ignored or refused to pay most such bills in Alaska, in contrast to other federal agencies and in apparent contrast to Interior's practice in other regions of the country. To justify its refusal, Interior claims sovereign immunity under circumstances that appear to be spurious; the lawsuit should resolve any uncertainty in this area. AAG Chris Kennedy represents DEC in the case.

### STEVE MULDER JOINS SECTION

Steve Mulder, formerly a partner in Dorsey & Whitney, has joined the Environmental Section. He fills the position vacated when Leroy K. Latta moved to the Collections and Support Section. Steve has an extensive background in environmental, utilities, and admiralty law.

### SANDY DALLAS JOINS SECTION

Sandy Dallas, a legal secretary for Robertson, Monagle and Eastaugh in Juneau for almost 25 years, joined the Environmental Section. Sandy fills the position vacated by Quincy Byrd when he returned to service with the federal government.

## Fair Business Practices

### INSURANCE

### PREMERA BLUE CROSS SEEKING TO CONVERT FROM NONPROFIT TO FOR-PROFIT CORPORATION

Premera Blue Cross (PBC) is the dominant health insurance carrier in Alaska. PBC holds a certificate of authority in Alaska to operate as a non-profit hospital medical service corporation. PBC is domiciled in Washington State and is registered as a nonprofit health service contractor there.

PBC has applied to the states of Washington and Alaska to convert from a non-profit status to a for-profit status. The proposed transaction would create for-profit stock companies in Alaska and Washington and exchange the new stock from these companies for assets of the existing non-profit companies. Ultimately, this new stock would be contributed to a non-profit foundation shareholder that would hold the stock and periodically sell stock to individual investors. The funds raised by such sales would be donated to two charitable entities, one in Alaska and one in Washington, intended to fund health care initiatives in the respective states.

The proposed transaction is similar to conversions that have been filed by Blue Cross/Blue Shield companies in other states. The Alaska Division of Insurance will be reviewing the proposed transaction to determine whether it is economically viable, fair and equitable to current PBC subscribers in Alaska, and of benefit to the overall health insurance market and economy in Alaska. Because PBC is domiciled in Washington, Washington is the lead regulator and is contracting with various legal, economic, and actuarial experts at PBC's expense to review the transaction and advised regulators.

Several of these experts have been designated to provide advice to the Alaska Division of Insurance. AAG Signe Andersen and AAG Nick Atwood have been providing legal advice to the division regarding the proposed transaction and will continue to assist the division in working with the experts to deal with Alaska specific issues.

## REGULATORY COMMISSION OF ALASKA

### RCA ARGUES FOR PRESERVATION OF 11TH AMENDMENT IMMUNITY BEFORE THE 9TH CIRCUIT

Oral argument was held before the 9th Circuit on September 30 on the RCA's claim of 11th Amendment immunity under the Telecommunications Act of 1996. The Telecom Act provides that persons dissatisfied with state utility commissions' decisions made implementing the Act's provisions must seek review in federal court.

ACS and GCI litigated an issue before the commission in 1999 concerning the rates that ACS could charge GCI to use its network in Fairbanks and Juneau for GCI's competition with ACS for market share in those service districts. After an arbitration decision was reached and adopted by the RCA, ACS brought suit in federal court naming the RCA and GCI as defendants. The RCA filed an 11th Amendment motion to dismiss, which was denied by the federal district court. At the time the district court denied the motion, the circuit courts were split on whether a state commission constructively waives its sovereign immunity by participating in a federal regulatory scheme that says judicial review is limited to federal court.

The U.S. Supreme Court reviewed this issue last term, but did not decide it. Instead, the Court opined that state commission decisions could be maintained against state commissioners in their official capacities under the *ex parte* Young doctrine, but the Court declined to decide whether state commissions themselves retained their sovereign immunity.

The 9th Circuit had stayed its consideration of the RCA/ACS appeal until the Supreme Court issued its decision. Before argument, and in light of the Supreme Court's decision, the RCA had offered to allow a substitution of defendants (the RCA commissioners for the RCA) in order to avoid the constitutional question. After first agreeing to settle the appeal on this basis, ACS subsequently refused.

At oral argument, the court asked why the case could not be resolved by a substitution of defendants. The RCA told the court it had previously agreed to do so, but ACS had refused. When asked by the court, ACS again refused, without providing any clear justification for its refusal.

On October 3, the court issued an order requiring ACS to show cause why the RCA's commissioners should not be substituted for the RCA as defendants, with the RCA then being dismissed from the case. The court noted that unless good cause was shown it would do so as agreed to and requested by the RCA.

## Governmental Affairs

### JUDGE UPHOLDS HAINES CONSOLIDATION ELECTION

Superior Court Judge Patricia Collins issued an order on October 7, 2002, finding in the state's favor in an election contest action filed by 22 voters from the Haines Borough. The plaintiffs challenged the election by which the City of Haines and the Haines Borough were consolidated into a first-class borough. The plaintiffs had earlier brought an action for a TRO seeking to enjoin the election, but the state also prevailed in that action. In the later election contest action, the plaintiffs raised six

grounds challenging how the state division of elections had conducted the consolidation election. The state provided the court with pre-hearing briefing on issues relating to the election contest, and the court subsequently held an evidentiary hearing at which the plaintiffs were supposed to present evidence in support of their claims.

Following the hearing the judge issued an eleven-page order finding in favor of the state on all grounds. The judge found that the division had not improperly allowed nonresidents of the Haines Borough to vote in the consolidation election; that the division had not arbitrarily changed the number of registered voters eligible to vote in the election; that the division's voter registration records are not inaccurate; that the by-mail election did not violate the secret ballot requirement; that the form of the ballot envelopes used in the election complied with Alaska law; and that the division properly accepted ballot envelopes containing a postal inspector's stamp, rather than signature.

### JUDGE RULES THAT GRIEVANCE SETTLEMENT BINDS FORMER EMPLOYEE

Judge William Morse ruled that a union's agreement to settle a former state employee's grievances is binding on the former employee unless he proves that the union breached its duty of fair representation in handling or settling the grievances. The former employee had filed grievances asserting that the Department of Corrections had wrongfully suspended him and, later, wrongfully terminated his employment. Once the union concluded that the former employee had suffered no losses because of his termination, it agreed to settle the grievances for the two weeks' wages he had lost during his suspensions.

Dissatisfied with the union's settlement, the former employee filed a wrongful-discharge suit against the state despite the union's written settlement agreement. In our summary judgment motion, we asked Judge Morse to rule that the settlement agreement barred the former employee from bringing wrongful-discharge claims based on his employment contract because the union was his exclusive representative for purposes of that contract and had settled his contract claims.

The Alaska Supreme Court has ruled that – unlike private-sector employees – a former public employee may bring contract-based wrongful-discharge claims to court without proving that the union breached its duty of fair representation if the union refused to pursue a grievance concerning the discharge. The court has not addressed whether the same rule applies when the union decides to settle a discharge grievance. Based in part on the former employee's concession, Judge Morse ruled that the former employee can avoid the effect of the union's settlement agreement only if he demonstrates that the union breached its fair-representation duty.

## Human Services

### PERSONNEL NEWS

The Fairbanks Office of the Attorney General is pleased to announce that Gayle Garrigues has joined the Human Services Section as an Assistant Attorney General. Gayle is a former Assistant District Attorney (3 years in Kotzebue and 11 years in Fairbanks) and had been working in the private sector before being hired on at the Fairbanks AGO.

We would like to thank Susan Paterson for helping us out in the Human Services section during the transition.

## Legislation/Regulations

### IMPORTANT REGULATIONS PROJECTS REVIEWED

During September 2002, the Legislation and Regulations Section spent an active month reviewing and approving state regulations for filing by the Office of the Lieutenant Governor.

The topics included: licensing of child care facilities for the State Board of Education and Early Development; improvements to the state procurement code for the Department of Administration; waterway marking system for the Department of Natural Resources; agricultural loans for the Board of Agriculture and Conservation; evidence of financial responsibility for the Department of Environmental Conservation; reductions to the Chronic and Acute Medical Assistance Program in the Department of Health and Social Services; OSHA program update for the Department of Labor and Workforce Development; a variety of topics for occupational licensing boards for the Department of Community and Economic Development; and fisheries regulations for the Board of Fisheries.

### PERSONNEL

Jean Feakes, our long-time law office assistant, retired effective September 30 with over 20 years of state service. We're already missing her.

## Natural Resources

### STATE, EKLUTNA, INC., FINALIZE AMENDMENTS TO NORTH ANCHORAGE LAND AGREEMENT

During the week of September 23, after years of negotiation, the state finalized two documents strengthening and further implementing the North Anchorage Land Agreement (NALA). Signed in 1982, NALA settled land claims by Eklutna, Inc., and provided the state with management rights and contingent title to thousands of acres of private land within Chugach State Park. The NALA "Third Amendment to Contract" ratifies changes allowing realignment of the Alaska Railroad within NALA lands and allows the state to receive NALA "Exhibit E" lands under the Mental Health Enabling Act rather than the Alaska Statehood Act, at the state's election. The NALA Land Bank Agreement details future management and possible transfer of "Exhibit C" lands, within Chugach State Park, to the state. In addition to the state and Eklutna, Inc., signatories were the Municipality of Anchorage and the Bureau of Land Management. AAG John Baker represented the Department of Natural Resources in the negotiations.

### COURT UPHOLDS CHIGNIK SALMON CO-OP REGULATIONS

On September 30, 2002, Juneau Superior Court Judge Patricia Collins granted summary judgment to the Board of Fisheries, upholding 5 AAC 15.359, the Chignik Area Cooperative Purse Seine Salmon Fishery Management Plan and finding that the co-op regulation was within the constitutional and statutory authority of the board. ADF&G was able to manage the co-op and competitive fisheries to meet the escapement and allocation goals for the area. At least one of the two plaintiffs is likely to appeal. In the meantime, the board will hold a meeting December 5-6, 2002, to consider

changes to the Chignik co-op regulations. Fishermen in several other areas have expressed interest in similar regulations for their commercial salmon fisheries.

### SUPERIOR COURT UPHOLDS COMMISSIONER'S DETERMINATION ON COOK INLET BELUGA WHALES

The state received a favorable ruling from the superior court in litigation over the status of the Cook Inlet population of beluga whales. Late in 1999, environmental organizations petitioned ADF&G Commissioner Frank Rue to identify the whales as endangered under Alaska's endangered species law. Commissioner Rue decided that the whales did not meet the statutory criteria, and in July 2000 he issued a detailed written decision explaining that determination. Two of the original petitioners challenged the validity of the decision in a declaratory judgment action in the superior court. The case was presented to the court on cross-motions for summary judgment. In September, Judge Tan issued a 10-page order upholding Commissioner Rue's determination that that Cook Inlet population is not threatened with extinction. The state is now awaiting the entry of a final judgment.

## Oil, Gas, & Mining

### KENAI-KACHEMAK NATURAL GAS PIPELINE LEASE APPLICATION IS PROCEEDING

The State Pipeline Coordinator's Office, in the Department of Natural Resources, is working under an accelerated schedule to issue an AS 38.35 pipeline right-of-way lease for the proposed Kenai-Kachemak natural gas pipeline by the end of November 2002. The application, from a joint venture of principals UNOCAL and the Marathon Oil Company, proposes a 32-mile, 16-inch diameter transmission line, to be primarily located within the Sterling Highway right-of-way. The pipeline would ship recently proven natural gas reserves from the Ninilchik area to the Upper Cook Inlet area market. The SPCO and DNR have been consulting with AAG Philip Reeves in their review and processing of the right-of-way application.

## Special Litigation

### FERRY WORKER INJURY CASE GOES TO TRIAL

Unlike most employees, state ferry workers may sue their employer for on-the-job injuries under federal maritime law; workers' compensation is not their exclusive remedy. Rudy Lee, an ordinary seaman on the M/V Kennicott, sued the state for an injury to his right knee that he claimed to have incurred while moving a heavy roller chock. He underwent three knee surgeries and the doctors opined he could not continue shipboard duty. As is typical of these kinds of cases, the plaintiff contended that AMHS was negligent under the Jones Act and the vessel was unseaworthy, primarily because he was improperly trained or was not provided proper equipment to lift the heavy roller. AMHS, represented by AAG Tom Slagle, disputed liability and argued that the plaintiff was responsible, at least in part, for his injury.

The case was tried before Judge Patricia Collins, without a jury. Based on the economic reports, the parties stipulated that, if liability were found, the plaintiff's past and future loss of income would be $275,000. At trial plaintiff asked for a total award of $675,000, including $400,000 for non-economic damages such as pain and suffering. Approximately a month after the four-day trial ended, Judge Collins issued a verdict, awarding Lee $100,000 for pain and suffering ($40,000 past and $60,000 future), in addition to the stipulated economic

damages, for a total of $375,000. In her 23-page decision, Judge Collins opined that Lee was improperly instructed to manually lift the roller rather than use a safety device, and therefore AMHS was liable for Jones Act negligence. It is noteworthy that the judge did not find the ship unseaworthy and did not award prejudgment interest.

## LAWSUIT AGAINST CORRECTIONS FOR FAILURE TO INVESTIGATE AND NEGLIGENT MEDICAL CARE DISMISSED BY COURT

In a personal injury lawsuit brought for damages against the state Department of Corrections, the plaintiff alleged that the Department of Corrections negligently investigated an alleged sexual assault when it took the plaintiff into protective custody due to inebriation. She claimed that Corrections failed to preserve evidence, her clothing, which might have assisted in apprehending the perpetrator of the sexual assault. The plaintiff also alleged a lack of medical care based on the presence of blood on her jeans.

The plaintiff never reported being assaulted or needing medical care while in 12-hour protective custody. Nor was medical treatment necessary. After she was released wearing the same clothes, she threw them away because they had "bad karma." The court granted summary judgment dismissing the lawsuit because Alaska law does not recognize a tort of negligent failure to investigate and also because the plaintiff claimed damages resulted from loss of evidence that she herself destroyed. The Department of Corrections was defended by AAG Stephanie Galbraith.

## COURT DISMISSES STATE EMPLOYEES FROM LAWSUIT AGAINST DEC ON ABSOLUTE IMMUNITY GROUNDS

State Village Safe Water officials were dismissed from a lawsuit against DEC arising out of their oversight and administration of VSW-related contracts between villages and their suppliers and contractors. Judge Christen ruled that the sued employees were absolutely immune from the claims made against them. The court found that the acts for which the employees were sued were discretionary acts taken within the scope of their authority, therefore official immunity applied. Applying the analyses for absolute immunity articulated by the Supreme Court in both *Aspen Exploration* and *Alpine Industries, Inc.,* the court further found that the employees were entitled to absolute official immunity.

The state has filed further motions addressing the remaining claims against the state and its contractor. Trial is set for January 2003. AAG Venable Vermont, Jr., is representing the state defendants in this lawsuit.

## COURT FINDS QUALIFED IMMUNITY PROTECTS PRISONER TRANSPORTATION OFFICERS FROM SUIT

In *Helveston v. Galster, et al,* the plaintiff sued three Department of Corrections (DOC) prisoner transportation officers (PTOs) who had refused to fasten his seatbelt when he requested them to do so during transports by van from one facility to another. The plaintiff alleged that his head and neck were injured during a sudden stop on one transport and that he was emotionally distressed by aggressive driving and not having his seatbelt fastened during a second transport. Based upon the security and safety issues presented by having PTOs crawl back into a van load of prisoners, PTOs generally do not fasten seatbelts for inmates. Moreover, most inmates can fasten their own seatbelts even while wearing handcuffs and belly chains. Judge Gleason found that neither the refusal to fasten an inmate's seatbelt upon request nor driving in a matter considered unsafe by an inmate constituted a deprivation of a well-defined constitutional right necessary to overcome the defense of qualified immunity. AAG Robert Doehl represented the PTOs in this matter.

## BOARD CONCLUDES SKIN CONDITION DID NOT TOTALLY DISABLE FORMER STATE EMPLOYEE

A former state employee asserted he was permanently and totally disabled by a skin condition (dermatitis) he developed on both hands while working as a part-time dishwasher at the Anchorage Pioneers' Home. The state's adjusters denied his claim for permanent total disability workers' compensation benefits.

AAG Paul Lisankie represented the state at the resulting hearing before the Alaska Workers' Compensation Board. Evidence showed that the former employee had the necessary vocational skills, experience, and physical capacities to obtain suitable employment despite the skin condition. The former employee also admitted on cross-examination that he felt he was able to perform several jobs. However, he theorized that he had not been hired due to age discrimination.

In its September 6, 2002, decision and order the board denied and dismissed the claim. The board found that suitable jobs were indeed available to the former employee and he was therefore not entitled to receive total disability benefits.

## BOARD UPHOLDS ORDER DENYING BENEFITS FOR ALLEGED MULTIPLE CHEMICAL SENSITIVITY SYNDROME CONDITION

After a hearing, the Alaska Workers' Compensation Board issued a decision in May 2000 denying a former state employee's claim for benefits based upon an alleged multiple chemical sensitivity syndrome condition. Based predominantly upon the opinions of its own independent medical experts, the board concluded (contrary to the opinions of the former employee's experts) that she had not actually developed a multiple chemical sensitivity syndrome condition.

Approximately one year after the board's decision was published, the former employee petitioned the board to modify its denial. The petition sought to invoke the board's authority to modify a decision based upon a "change in conditions" or "mistake in its determination of a fact." The petition attempted to undercut the board's experts' opinions with evidence that had been developed throughout the year-long period following publication of the board's decision.

At hearing the state, represented by AAG Paul Lisankie, argued that the evidence did not establish any qualifying "change in conditions." The state also contended that the introduction of the new evidence was impermissible. Under the board's regulations, new evidence cannot be considered if it could have been obtained in time for the original hearing through the exercise of "due diligence."

In its September 3, 2002, decision and order the board denied and dismissed the petition. The board found that there was no evidence of a change in conditions and the new evidence addressed opinions expressed by its experts more than a year prior to the original hearing. Consequently, the board found that with due diligence the new evidence could have been developed in time for the original hearing and the attempt to introduce it a year later was impermissible.

# Criminal Division

## ANCHORAGE

Carl Brown was sentenced a second time to 80 years for murder in the first degree and five years for tampering with evidence, consecutively. However, this time the judge found an aggravating factor, that the victim was particularly vulnerable. Brown's murder retrial

lasted six weeks and deliberations lasted four full days. Brown is again appealing his case.

Jerome Logan was sentenced for murder and assault for the shooting death of Billy Waterson at a party following a basketball game. A third person's taunting of Logan precipitated a fight, which led to the shooting. Logan threw the first punch in a fistfight and was told to leave. Logan retrieved a pistol from the trunk of his car parked nearby and returned to point the weapon at Waterson's friend. Waterson jumped on Logan to save his friend and was shot to death. Logan claimed the matter was a tragic accident and that he did not intend to kill. However, Logan had a history of using weapons to establish his dominance when confronting others. The judge, observing that one "cannot bring a gun to a picnic," imposed a composite sentence of 82 years with 21 suspended.

Lloyd Pennebaker was sentenced on charges of burglary, sexual abuse of a minor, and drugs. The defendant was caught in the victim's home at 4 a.m. with a gun, gloves, mask, dark clothes, and panty hose in his pocket. He also had a photo of the 18-year-old girl who lived there. Police discovered he had committed other sexual abuse offenses by trolling chat rooms and using 17 different identities, including 8 in which he portrayed himself as a female. He was sentenced to a composite 11 years with 6 years suspended and 10 years probation.

Lamar Gathers pled no contest to murder and assault in the first degree. In August 2001, a man was sleeping with his girlfriend when Gathers came in the back of the house and murdered the man with a hatchet. Gathers also hit the girlfriend in the head and leg and twice on the arm. She managed to escape and run to her neighbor, an Anchorage police officer. Sentencing is scheduled for January.

Brian Grande was charged with unemployment fraud, committed while on felony probation for a previous conviction for unemployment fraud in 1999. He was using the money he got from the new fraud case to pay the state the money he owed as restitution in the old fraud case.

A man was indicted for felony assault for beating his girlfriend who was trying to leave him. At the time, the victim was unable to defend herself, because she was holding their seven-month-old baby in her arms. She was beaten so severely that she began to choke on her own blood. The nurse and responding officer said that they have never seen anyone beaten so badly who lived through it. The child received bruises to the head, which in a seven-month-old child has not fully formed yet.

A man was charged with the death of his two-month-old daughter, and also with assault for a skull fracture to her twin sister. In addition, the twins had many other fractures (in various stages of healing), but it could not be determined who inflicted them. Bail was set at $500,000.

## BARROW

The Barrow grand jury indicted several defendants for a variety of felony assaults in the first, second, and third degrees. One person was indicted for evidence tampering.

Charlene Hugo received a two-year SIS for bootlegging, conditioned on serving 33 days in jail.

## BETHEL

Edward Yako was found not guilty of assault in the third degree and assault in the fourth degree, but was convicted of disorderly conduct following a jury trail.

Neil Chiklak was found not guilty of sale of liquor without a license following a jury trial.

Five people were indicted for felony assault, and five more for sexual assault. Two were

indicted for burglary, and one each for vehicle theft.

## FAIRBANKS

The Fairbanks office welcomed a new attorney, Christy Hepburn, who joins our misdemeanor unit. Long-time paralegal Roxanne Rigo left to take an investigator's job at the Public Defender Agency, and she was replaced by Joleen Cooper, formerly a secretarial supervisor.

There is cause to wonder whether the felony DUI statute is offering sufficient deterrence. One woman was charged with felony DUI and then, while out on $5,000 bail, plus a 24-hour sight-and-sound third party custodian, committed another, this time causing two accidents. Fortunately, there were no injuries. The third party custodian finally reported her absence about three days later.

## KETCHIKAN

September was a busy month for the DA's Office in Ketchikan. We were down one DA and had to live without Christi, our valuable paralegal, for most of the month. We still managed to indict persons for felony weapons offenses, numerous drug cases, multiple felony DUIs, two vehicle thefts, felony assault, burglary, and witness tampering.

The felony assault charge stems from an incident that occurred on the Hydaberg docks in late 2000 when the defendant hit the victim in the face with an object (probably a metal pipe) and caused permanent injuries, the treatment of which has already cost over $25,000.

We also prosecuted four jury trials. We won a felony forgery case despite the court's failure to admit evidence of eleven prior felony forgery convictions after the defendant testified that the entire situation was a mistake. We won the re-trial of a circumstantial felony drug case where the defendant was arrested on a bench warrant and, during his transport to the jail, dumped a small bindle of cocaine in the patrol car. We also won a misdemeanor domestic violence assault trial where the defendant has a long history of domestic abuse, all of which came in under 404(b)(4). Last, we won a non-DV assault trial where the highly intoxicated female defendant hit the sober, five months pregnant, victim in the stomach in a bar.

## KODIAK

A 19-year-old Kodiak man was sentenced to 48 months in jail, with 42 months suspended, and placed on probation for seven years following his conviction for sexual assault of a minor in the third degree. This defendant had been charged with having sexual contact with a 15-year-old minor at a juvenile alcohol party. The court was able to aggravate the sentence beyond a "normal" sentence for someone with no prior criminal history by finding that the victim was particularly vulnerable because of her young age and inexperience with alcohol.

Just say no to drugs, but say yes to drug testing. A 21-year-old man from Old Harbor was indicted for misconduct involving a controlled substance in the third degree after procuring a bag of marijuana for two 14-year-old residents. This case came to the Troopers' attention after one of the 14-year-old boys failed a drug screen that his parents administer to him on a random basis. When the drug screen came back positive for THC, the active ingredient of marijuana, the parents investigated the source of the drug and called the Troopers with names and dates. A December trial date is pending.

## KOTZEBUE

Russell Williams, III, a 24-year-old Kotzebue resident, stole a fast food delivery truck and damaged it in his attempted get-away. It is unclear where he was planning on going as Kotzebue has only a few miles of road, none of which go anywhere outside of Kotzebue.

Williams was arrested and charged with vehicle theft in the first degree. He entered a no contest plea and was promptly sentenced to a two-year presumptive term.

An Ambler resident was arrested on a charge of theft in the second degree for stealing over $1,500 in money orders from the office at the Red Dog Mine, where she was a former employee.

Stephen Lie of Shungnak was acquitted on a sexual assault in the first degree charge after a week-long jury trial. On the day the verdict was announced Mr. Lie ran into further trouble with the law; he was charged with promoting contraband for attempting to smuggle cigarettes and a lighter into the Kotzebue jail. Those two items were apparently given to Lie by his wife at the courthouse during the trial.

**NOME**

A 56-year-old Shaktoolik resident was arrested and charged with several counts of sexually abusing a five-year-old child in that village, and essentially admitted the offenses during the course of the investigation.

The Nome police, in doing an airport interdiction, intercepted a man on his way to the dry village of Stebbins with two cases of whiskey (an amount sufficient to charge a felony). The going rate for a bottle of whiskey in Stebbins is $125, so there is a substantial incentive for the bootlegger willing to take the risk.

The grand jury indicted a woman on a felony assault charge for stabbing her boyfriend. When this case was first reported, the boyfriend had claimed he had stabbed himself while trying to cut up a pizza. At grand jury, the boyfriend had changed his story, now claiming that he had stumbled into the defendant, who had been holding a knife cutting up a pizza. The grand jury apparently didn't buy either story.

Other new cases include a felony DUI committed by a man visiting Nome and driving a rental vehicle, so no forfeiture issue is involved.

## OSPA
(Office of Special Prosecutions & Appeals)

**Personnel News**

Ros Lockwood left OSPA for the warmer climes of California, where she intends to pursue a career as a civil litigator. Ros left friends not only in OSPA, but also in the district attorney offices in which she had previously worked (Bethel, Kotzebue, and Anchorage).

Jim Hanley came out of retirement to work at OSPA on a temporary basis while a replacement for Ros is found. Jim worked as a trial prosecutor and appellate lawyer for a number of years.

## Petitions & Briefs of Interest

**Petitions of Interest**

**Heat of passion defense.** Judge Johannides determined, in a prosecution for attempted murder, that the defendant could raise the defense of heat of passion, even though the defense is statutorily limited to two circumstances: (1) when a defendant is charged with first-degree murder under AS 11.41.100(a)(1)(A) (intentionally killing another person), and (2) when a defendant is charged with second-degree murder under AS 11.41.110(a)(1) (intentionally or knowingly causing serious physical injury and causing the death of another person). Although the state's emergency petition was denied, the state is seeking the discretionary review of the Alaska Supreme Court. (The jury hung on the attempted murder charge.) *State v. Croughen*, A-8425.

**Entrapment.** Judge Curda dismissed an indictment after finding that the police had entrapped the defendant by asking him if he was interested in trading alcohol for illegal bear parts. In a petition for review to the Alaska Court of Appeals, the state argues that the police officer's conduct in the case did not fall below the acceptable standard for the fair and honorable administration of justice, particularly given the defendant's willingness to engage two separate times in the prohibited trade. As part of its petition, the state argues that Judge Curda erred in finding that a reasonable person, "specifically in Bethel," would have believed it was legal to trade alcohol for big game animal parts. *State v. Yi,* A-8430.

**Ineffective assistance and plea withdrawal.** The court of appeals issued an opinion that can be read as holding that a defendant is entitled to plea withdrawal whenever he has not personally reviewed all of the discovery in a case. See *Garay v. State,* --- P.3d ---, Op. No. 1823 (Alaska App., August 30, 2002). In a petition for hearing to the Alaska Supreme Court, the state argues that it is enough that a competent attorney has reviewed the discovery and advised the defendant on the merits of the proposed plea. The defendant does not have to personally review all the discovery. *State v. Garay,* S-10811.

**Reliance on memorandum appellate opinions.** The court of appeals issued an opinion holding that despite Alaska Appellate Rule 214(d) stating that memorandum appellate opinions may not be cited in the courts of the state, parties can still cite such opinions for "informational" purposes. See *McCoy v. State,* --- P.3d ---, Op. No. 1822 (Alaska App., August 30, 2002). In a petition for rehearing, the state argues that allowing lawyers to cite memorandum appellate opinions for any purpose (other than to establish facts) violates both the intent and letter of Appellate Rule 214. *McCoy v. State*, A-7789.

**Briefs of Interest**

**Search and seizure – abandonment of property.** The state argues that a defendant who is being followed by a police officer and who places a tissue-wrapped package of cocaine under a closet door in a motel where the defendant is not a guest has abandoned the property for Fourth Amendment purposes. *Young v. State,* A-8056.

**Statements of potential jurors during *voir dire.*** During ***voir dire***, a potential juror stated that she distrusted the defense attorney due to her experience as a juror in a prior trial where the defense attorney was representing a different defendant. The state argues that the court did not err in denying the defendant's motion to quash the entire jury panel due to this statement of the potential juror. *Nelson v. State,* A-8113.

**Ninth Circuit Opinion On Prison Telephone Access.** Juan Valdez was a federal pre-trial detainee at Cook Inlet Pretrial Facility. The prosecutor asked the U.S. Marshal to limit the inmate's telephone access so that he could only telephone his attorney. The prosecutor feared that Valdez would tip off his co-defendants when the grand jury later indicted them. To restrict his telephone access, CIPT put Valdez in administrative segregation. He filed suit claiming that his First Amendment rights were violated by this arrangement. Judge Singleton ruled that the defendants did violate his rights, but granted qualified immunity to the defendants. On appeal, the state took the position that his constitutional rights were not violated by placing him in ad seg and limiting his telephone calls. The Ninth Circuit agreed. The First Amendment provides a right to communicate with persons outside the prison walls, and use of a telephone is only one way of exercising that right. Valdez's First Amendment rights were not violated because he still retained visitation privileges and he could also write to his family and friends.